JUN 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1603

CLARENCE M. DITLOW, *et al.*,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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Since the filing of the petition for certiorari, this Court has decided *Nader v. Allegheny Airlines, Inc.*, No. 75-455 (June 7, 1976), which, for the reasons set forth below, requires a reversal of the decision of the Court of Appeals, or at the least, a remand for consideration in light of that decision.

1. Petitioners have asked this Court to review the decision of the Court of Appeals creating an implied exemption from the antitrust laws which immunized respondents from liability for their price fixing activities and prevented each of 600,000 airline passengers from recovering the resulting $40 overcharge. Respondents have conceded

that their price-fixing agreement was not approved by the CAB as is required for antitrust immunity under §414 of the Federal Aviation Act, 49 U.S.C. §1384 (Stip. ¶26, A. 21). Nevertheless, they argue that an implied exemption from the antitrust laws should be created in order to relieve them from liability for their price-fixing activities, even though this would allow respondents to retain the $24 million that they unlawfully collected from their passengers.

This Court's recent decision in *Nader v. Allegheny Airlines, Inc.*, however, explicitly rejected a similar implied exemption argument which also arose under the Federal Aviation Act. In *Allegheny* the airline contended that the regulatory scheme established by the Federal Aviation Act created an implied exemption from common law tort liability for fraudulent misrepresentation. This Court held that the general supervisory authority of the CAB alone did not provide such immunity, stating that implied immunities exist only where necessary to prevent a collision between two regulatory schemes and only where there is a "direct and unambiguous" conflict rendering the two schemes "absolutely inconsistent." Slip op. at 9. The Court also emphasized that when Congress has sought to confer immunity, it has done so explicitly, citing as an example the antitrust immunity provision of §414 — the very provision that respondents are here charged with failing to follow. In the present case, no conflict exists between the antitrust laws and the Federal Aviation Act because respondents could have easily complied with the dictates of both by simply not charging the higher fares once the approved interim agreement expired. Because respondents chose to continue charging the higher fares well beyond the 30 day

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period authorized by the CAB, respondents should not be allowed to retain the profits that they were able to secure only by circumventing the CAB's Orders.[1]

2. In a further effort to convince this Court not to review the lower court's decision, respondents rely heavily on the CAB's March 6, 1975 Order which stated that the interim fares remained in effect throughout the relevant period. When the Court of Appeals initially remanded this case, it instructed the parties to obtain the opinion of the CAB concerning what fares were in effect during the relevant period, calling this the "first critical, and perhaps dispositive, issue in the case." (A. 10). The Court never explained how this issue could dispose of petitioners' antitrust claim, but the implication of this statement is that if respondents had charged effective fares, they would somehow have been immunized from antitrust liability even though they did not satisfy the requirements of §414. This view of the law is at odds with the *Allegheny* decision, which not only refused to preempt an available remedy by implication in the absence of a direct conflict, but also indicated that even the referral to the CAB on the grounds of primary jurisdiction was wholly inappropriate in this case.

The *Allegheny* opinion emphasized that primary jurisdiction is appropriate only in cases where "the issue involves

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[1] The CAB approved the higher fares only for 30 days since respondents had not filed any economic justifications for those fares. To emphasize the temporary nature of this interim approval, the CAB noted that on its face, the interim price-fixing agreement contained an April 30 expiration date. Moreover, the CAB specifically ordered respondents not to file tariffs implementing the permanent agreement prior to CAB approval of that agreement. (Stip. ¶¶ 8 & 10; A. 16-17).

technical questions of fact uniquely within the expertise and experience of an agency — such as matters turning on an assessment of industry conditions." Slip op. at 13. It is not to be used in cases such as this where the "action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice." Slip op. at 14. Here, the issue before the court was one of statutory construction concerning whether respondents had satisfied the conditions necessary for antitrust immunity. With respect to this question of law, as the *Allegheny* opinion states, the "standards to be applied . . . are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." Slip op. at 14-15 (footnote omitted). Even if the Court of Appeals had been justified in referring the present action to the CAB, there was no basis whatsoever for abdicating its jurisdiction over questions of law and totally deferring to the CAB, especially since the CAB refused to accept briefs, hear argument, or even discuss the legal issues, but only recited the undisputed facts of this case. (A. 24).[2]

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[2] The same analysis also applies to petitioners' statutory claim that respondents violated §403(b) of the Federal Aviation Act, 49 U.S.C. §1373(b), by charging the higher fares contained in the interim tariff during the relevant period, because the effect of the CAB's Orders was to cancel the interim tariff when the interim agreement expired at the beginning of the relevant period. Like petitioners' antitrust claim, the statutory claim also presented issues of law which courts are competent to decide, not technical issues of fact that have been assigned to the CAB.

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3. In urging the Court not to review the lower court decision, respondents also assert that they are not likely to repeat the actions which gave rise to this lawsuit and that an opinion of this Court would be of little precedential value. However, this contention, which respondents have chosen to make their lead argument, completely obscures the fact that unless this Court grants certiorari, respondents will be able to retain $24 million in unauthorized overcharges, and petitioners will be left completely without a remedy.

Moreover, this case raises important questions concerning implied antitrust exemptions and the interaction between the antitrust and regulatory schemes. While this Court held in *Allegheny* that the Federal Aviation Act does not preempt other remedies in the absence of an irreconcilable conflict, slip op. at 9, the Court of Appeals reached the opposite result, believing it to be so clearly correct that no explanatory opinion was even needed. The wide divergence between these two legal interpretations indicates that Supreme Court guidance is needed.

For the reasons stated herein and in the petition for a writ of certiorari, this Court should review the lower court's decision.

Respectfully submitted,

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Dated: June 14, 1976